SUPREME COURT, U.S.
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No. 09-1310

IN THE

Supreme Court of the United States

JILL LINDSAY, *et al.*,
Petitioners,

v.

ASSOCIATION OF PROFESSIONAL FLIGHT ATTENDANTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS AMR CORPORATION AND AMERICAN AIRLINES, INC.'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can a dissatisfied group of represented airline employees who wish to invalidate a collective bargaining agreement negotiated by their certified Railway Labor Act bargaining representative state a cause of action that the employer's implementation of the agreement breached the status quo under Sections 2 First and 2 Seventh of the Railway Labor Act?

2. Can a group of employees who are represented by a union under the federal Railway Labor Act pursue state law claims for breach of a union constitution against their certified bargaining representative and their employer based on the bargaining representative's collective bargaining conduct subject to the duty of fair representation under the Railway Labor Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent American Airlines, Inc. hereby avers that AMR Corporation is the parent corporation of American Airlines, Inc.

Respondent AMR Corporation is a publicly held corporation. FMR, LLC and PrimeCap Management Company each own more than 10% of AMR Corporation's stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Background	1
B. Industry Turmoil And The Threat Of Bankruptcy	2
C. Negotiations With The APFA	3
D. The RPA And The Ratification Process	4
E. The Dispute Over Executive Compensation	5
REASONS WHY THE PETITION SHOULD BE DENIED	7
I. THE SECOND CIRCUIT CORRECTLY HELD THAT PETITIONERS MAY NOT BRING AN ACTION UNDER THE RAILWAY LABOR ACT TO DIRECTLY CHALLENGE THE COLLECTIVE BARGAINING DECISIONS OF THE UNION THAT REPRESENTS THEM	8
II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON WHETHER SECTION 2 FIRST OR SEVENTH ALLOWS A RIGHT OF ACTION FOR INDIVIDUAL EMPLOYEES	15
A. The Cases Cited By Petitioners Do Not Support An Individual Employee's Direct Right Of Action	15

TABLE OF CONTENTS—Continued

Page

B. The Second Circuit's Conclusion That Section 2 First And 2 Seventh Do Not Provide A Direct Right Of Action For Individual Employees Is Consistent With The Court's Precedent And Decisions In The Third And Seventh Circuits 19

III. PETITIONERS' REMEDY FOR THEIR ALLEGED INJURIES WAS THROUGH A CLAIM FOR BREACH OF THE DUTY OF FAIR REPRESENTATION 21

IV. PETITIONERS' STATE LAW CLAIMS ARE PREEMPTED BY THE RLA 23

CONCLUSION 24

TABLE OF AUTHORITIES

CASES Page

Air Line Pilots Ass'n v. Pan Am World Airways, 765 F.2d 377 (2d Cir. 1985)..... 12, 22
Alexander v. Sandoval, 532 U.S. 275 (2001)..... 9
Bensel v. Allied Pilots Ass'n, 387 F.3d 298 (3d Cir. 2004)..... 19, 20
Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969)..... 23, 24
Brown v. Bd. of Ed. of Topeka, 344 U.S. 1 (1952)..... 7
Burke v. Compania Mexicana de Aviacion, S.A., 433 F.2d 1031 (9th Cir. 1970)..... 16
Carbone v. Meserve, 645 F.2d 96 (1st Cir. 1981)..... 18
Chicago & Nw. Ry. v. UTU, 402 U.S. 570 (1971)..... 18
Consol. Rail Corp. v. RLE, 491 U.S. 299 (1989)..... 18
Cort v. Ash, 422 U.S. 66 (1975).....9, 10, 16
Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142 (1969)..... 12, 18
Flagship Airlines, Inc., 22 N.M.B. 331, 353-55 (1995)..... 2
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)..... 22
Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986)..... 23
IAM v. Transportes Aereos Mercantiles, 924 F.2d 1005 (11th Cir. 1991)..... 18
Lebow v. American Trans Air, Inc., 86 F.3d 661 (7th Cir. 1996)..... 16
Marcoux v. Am. Airlines, 645 F. Supp. 2d 68 (E.D.N.Y. 2008).....2, 3, 4, 5, 6

TABLE OF AUTHORITIES—Continued

Page

Muller v. Oregon, 208 U.S. 412 (1908)..... 7
Mungin v. Florida E. Coast Ry. Co., 416 F.2d 1169 (5th Cir. 1969)..... 18
NLRB v. Allis-Chalmers Mfg., 388 U.S. 175 (1967).....10, 12, 14, 19, 21-22
Order of R.R. Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960)..... 18
Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342 (1944)..... 14, 18
Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1946)..... 18
R.R. Yardmasters. v. Pennsylvania R.R., 224 F.2d 226 (3d Cir. 1955)..... 18
Reg'l Airline Pilots v. Wings West Airlines, 915 F.2d 1399 (9th Cir. 1990)..... 18
Renneisen v. American Airlines, Inc., 990 F.2d 918 (7th Cir. 1993)..... 20, 21
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)..... 24
Signature Flight Support, 34 N.M.B. 1 (2006)..... 2
Southern Ry. v. B.L.F.E., 384 F.2d 323 (D.C. Cir. 1967)..... 18
Spellacy v. Air Line Pilots Ass'n, 156 F.3d 120 (2d Cir. 1998), *cert. denied* 526 U.S. 1017 (1999)..... 22
Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).....11, 13, 22
Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922 (1st Cir. 1983)..... 16
Texas & New Orleans R.R. v. Bhd. of Ry. & Steamship Clerks, 281 U.S. 548 (1930).... 18

TABLE OF AUTHORITIES—Continued

Page

Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants, 489 U.S. 426 (1989)..... 17
United Indus. Workers v. Galveston Wharves, 351 F.2d 183 (5th Cir. 1965)..... 18
UTU, Local 63E v. Penn Cent. Co., 443 F.2d 131 (6th Cir. 1971)..... 18
Vaca v. Sipes, 386 U.S. 171 (1967) 11, 22
Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515 (1937)..... 13, 18

STATUTES

Railway Labor Act, 45 U.S.C. §§ 151, *et seq.*.....2, 6, 7, 10
Section 2 First, 45 U.S.C. § 152, First.....8, 9, 10, 11, 15, 16, 17, 20
Section 2 Fourth, 45 U.S.C. § 152, Fourth.....11, 12, 13, 16, 17
Section 2 Ninth, 45 U.S.C. § 152, Ninth 13, 14, 20
Section 2 Second, 45 U.S.C. § 152, Second 11, 20
Section 2 Seventh, 45 U.S.C. § 152, Seventh.....8, 9, 11, 12, 13, 15, 16, 17, 20
Section 2 Tenth, 45 U.S.C. § 152, Tenth 16
Section 2 Third, 45 U.S.C. § 152, Third..... 17

MISCELLANEOUS

National Mediation Board Weekly Activity Report December 22, 2008 - December 26, 2008, Case No. A-13489, *available at* http://www.nmb.gov/activ-rpts/odarch.html 7

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STATEMENT OF THE CASE

A. Background

The Petitioners are a group of flight attendants who are seeking to invalidate a collective bargaining agreement negotiated in April 2003 between their exclusive bargaining representative, the Association of Professional Flight Attendants ("APFA"), and their employer, American Airlines, Inc. ("American"). The 2003 collective bargaining agreement at issue, known

as the Restructuring Participation Agreement ("RPA") enabled American to avoid joining the other major carriers that had filed for bankruptcy in the economic wake of the events of September 11, 2001.

B. Industry Turmoil And The Threat Of Bankruptcy

American is one of the world's largest passenger airlines, providing scheduled jet service to destinations throughout North America, the Caribbean, Latin America, Europe, and the Pacific. Ct. Appeals Joint Appendix "JA" 2500; JA-2807 ¶ 4. AMR Corporation ("AMR") is the publicly-traded parent company of American. JA-2500.[1] American is a "carrier" subject to the Railway Labor Act 45 U.S.C. §§ 151, *et seq.* ("RLA"). JA 50 ¶ 38; JA-205 ¶ 38. The APFA is the union that is certified by the National Mediation Board as the exclusive collective bargaining representative of the craft or class of all American flight attendants under the RLA. JA-51 ¶ 42; JA-205 ¶ 42.

The downturn in the United States economy in 2001, which adversely affected the demand for business travel domestically and internationally, combined with the tragic events of September 11, 2001 to worsen American's financial condition. *See Marcoux v. Am. Airlines*, 645 F. Supp. 2d 68, 71-72 (E.D.N.Y. 2008); JA-2817-2820; JA-2903-2905; JA-2658.

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[1] AMR cannot be sued under the RLA because it is not directly involved in the provision of air transportation services and is not a "carrier" as defined under the RLA. JA-2808 at ¶ 4. *See also Signature Flight Support*, 34 N.M.B. 1, 2 (2006) (explaining that AMR is a "holding company"); *Flagship Airlines, Inc.*, 22 N.M.B. 331, 353-55 (1995) (describing AMR as American's parent Company without reference to AMR's own status as a "carrier").

On August 13, 2002, in an effort to correct its deteriorating financial condition, American's management announced a series of initiatives to reduce its costs by at least $4 billion. JA-2819; JA-2905. As part of this effort, American sought $1.8 billion in savings from renegotiation of its collective bargaining agreements and savings from its officers, managers and unrepresented employees. *Marcoux*, 645 F. Supp. 2d at 72; JA-3716; JA-3942 at 22:11-25. The alternative was almost certain bankruptcy.

C. Negotiations With The APFA

In February 2003, American made a formal request to the three unions (APFA, the Allied Pilots Association ("APA") and the Transport Workers Union, AFL-CIO ("TWU")) that represent American's employees to negotiate and restructure their collective bargaining agreements. *Marcoux*, 645 F. Supp. 2d at 72-73; JA-3942 at 22:10-13; *see also* JA-3268-3270. American requested that the unions collectively agree to reduce annual labor costs by $1.6 billion, $340 million of which was sought from the APFA as the representative of American's flight attendants. JA-3942 at 22:11-23:25.

The APFA's Board of Directors convened in February 2003 to consider American's request for concessions. It received presentations about American's dire financial condition and resolved that the APFA would negotiate with American because the Board "[understood] that the best interests of the membership will be served by taking all appropriate action to expeditiously address [American's] financial situation" to ensure that American continued as a viable and successful entity. *Marcoux*, 645 F. Supp. 2d at 73-74; JA-1333.

American and the APFA engaged in intense negotiations against a March 31, 2003 deadline set by American for achieving tentative agreements in order to avoid a bankruptcy filing. *Marcoux,* 645 F. Supp. 2d at 74-75; JA-3847 at 46:17-22; JA-1130 at 151:10-23; JA-1165 at 290:20-291:7; JA-3944 at 30:7-31:19; JA-3948 at 51:15-52:10; JA-3972 at 200:17-21.

D. The RPA And The Ratification Process

American and the APFA tentatively agreed to the RPA on March 31, 2003. *Marcoux,* 645 F. Supp. 2d at 76; JA-3400-3410; JA-3955 at 102:8-103:11. (The TWU and APA also reached agreements in a timely fashion. JA-1154-1166 at 290:20-291:7; JA-3944 at 30:7-31:19; JA-3948 at 51:15-52:10; JA-3972 at 200:17-21). American set a deadline of April 15, 2003 for member ratification of all of its restructuring labor agreements. JA-3696 at 25:20-26:11. This deadline was set out of concern that American's financial condition would continue to deteriorate and cause liquidation of the company and additional job losses. JA-3698 at 27:5-12. To meet the April 15, 2003 deadline, the APFA decided to utilize expedited, electronic balloting procedures for the ratification vote. *Marcoux,* 645 F. Supp. 2d at 77; JA-1465.

On the morning of April 15, 2003, management representatives met with representatives of all three unions at American's headquarters to discuss the status of the restructuring agreements. JA-3960 at 137:6-13. APFA representatives had previously requested that American extend the deadline for ratification. *Marcoux,* 645 F. Supp. 2d at 79-80. The APA also asked for an extension of a few hours and TWU had already ratified its RPA. JA-3961 at 139:17-140:2. Based on concerns that flight attendants had not been able to change their votes during

the ratification process, both APA and TWU supported a possible extension of the APFA voting period. *Marcoux,* 645 F. Supp. 2d at 80; JA-3960 at 137:4-17. In response, American's CEO, Don Carty, offered to delay the bankruptcy filing by one day, until April 16, 2003, in order to allow the APFA to extend its voting period. *Marcoux,* 645 F. Supp. 2d at 80; JA-3707 at 37:5-38:1; JA-3706 at 40:7-25; JA-3724 at 90:19-23; JA-3726 at 92:12-18, JA-3740 at 135:10-24. The APFA's Board of Directors accepted American's offer of a one-day extension. *Marcoux,* 645 F. Supp. 2d at 80; JA-1609. APFA informed its membership about the vote extension and the opportunity for flight attendants to change their votes. *Marcoux,* 645 F. Supp. 2d at 81; JA-3397 at 120:2-19; JA-1461.

The final vote count on April 16, 2003 was 10,761 "Yes" votes and 9,652 "No" votes. *Marcoux,* 645 F. Supp. 2d at 81; JA-1468; JA-622 at 195:19-196:21; JA-1252 at 94:7-24. On April 16, 2003, APFA informed American that the RPA had been ratified by the membership. JA-3969 at 180:24-181:17. Both American's management and APFA's leadership recognized that a new, ratified collective bargaining agreement was in place on April 16, 2003. JA-3689 at 342:16-343:22; JA-1123 at 122:14-123:7, 512:3-12; JA-3734 at 113:11-18.

E. The Dispute Over Executive Compensation

In 2002, AMR's Board of Directors ("Board") had funded its Senior Executive Retirement Plan ("SERP"), a retirement plan for members of management who earn more than can be covered under American's other defined benefit pension plans, and also signed retention agreements with certain executives. *Marcoux,* 645 F. Supp. 2d at 83; JA-2900; JA-3721 at 83:4-11; JA-3642 at 54:14-55:25. On April 17, 2003,

the Wall Street Journal published an article about American's funding of the SERP and, as a result of this widely-publicized disclosure, the APFA threatened to conduct a new vote on the ratification of the RPA. *Marcoux,* 645 F. Supp. 2d at 84; JA-3467; JA-3970 at 189:19-24; JA-1198 at 421:16-422:9; JA-3730 at 103:11-20; JA-3470; JA-1475. As a result of this controversy, the American executives agreed to cancel their retention agreements and Don Carty resigned as CEO. JA-1202 438:21-25; 439:2-19; JA-3472; JA-3473. American also proposed certain enhancements to the RPA, which did not require any further concessions by APFA. *Marcoux,* 645 F. Supp. 2d at 85; JA-4138. The APFA agreed to these enhancements in order to avoid a bankruptcy filing, and thereby settled all remaining disputes relating to the RPA. JA-3974 at 211:20-22; JA-1481; JA-1537.

On April 25, 2003, American and the APFA agreed to a Letter of Agreement ("LOA") that resolved "all disputes which exist between them related to the negotiation, ratification, and final effectiveness of the Restructuring Agreement, dated April 16, 2003." *Marcoux,* 645 F. Supp. 2d at 85; JA-4138. The RPA was implemented on May 1, 2003 and governed the terms and conditions of the flight attendants' employment at American. JA-3720 at 74:16-22. As a result of the RPA and the other concessionary agreements negotiated with APA and TWU, American avoided bankruptcy proceedings. JA-3286.

The RPA became amendable on April 30, 2008, and on May 1, 2008 the parties commenced negotiations for a new agreement under the collective bargaining procedures of the Railway Labor Act. JA-3401. Those negotiations are ongoing and are presently being mediated by the National Mediation Board in

accordance with the Railway Labor Act. *See* National Mediation Board Weekly Activity Report December 22, 2008- December 26, 2008, Case No. A-13489, *available at* http://www.nmb.gov/activ-rpts/odarch.html.[2]

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition is filed on behalf of a relatively small, dissatisfied group of flight attendants who opposed a collective bargaining agreement negotiated in 2003 by their certified collective bargaining representative which enabled American Airlines to avoid bankruptcy.

The questions raised in the Petition involve back-door challenges to the 2003 collective bargaining agreement, based on legal theories that have no support in the Railway Labor Act or its applicable precedent. As the United States Court of Appeals for the Second Circuit found, the union's "vested authority is protected by the RLA [which is] a statutory regime that prioritizes continuity and 'majority rule' over the 'complete satisfaction' of all who are represented. *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. 175, 180 (1967). The facts of this case demonstrate why individual employee actions under Sec. 152 First would be inconsistent with a statutory scheme embodying these principles." App. 13A.

The Petitioners' Railway Labor Act and state law theories were rejected by the courts below, have no

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[2] The court may take judicial notice of matters of general knowledge and other facts. *See Muller v. Oregon*, 208 U.S. 412, 421 (1908) (stating that the Court "take[s] judicial cognizance of all matters of general knowledge."); *Brown v. Bd. of Ed. of Topeka*, 344 U.S. 1, 3 (1952) (taking judicial notice of a pending case in a different district).

support in other Courts of Appeals, and if adopted would disrupt the representative system of collective bargaining that has led to the successful resolution of labor disputes in the rail and airline industries for more than seventy-five years.

I. THE SECOND CIRCUIT CORRECTLY HELD THAT PETITIONERS MAY NOT BRING AN ACTION UNDER THE RAILWAY LABOR ACT TO DIRECTLY CHALLENGE THE COLLECTIVE BARGAINING DECISIONS OF THE UNION THAT REPRESENTS THEM

Petitioners are attempting to assert an individual employee cause of action against their employer, under the status quo provisions of the Railway Labor Act, to invalidate a collective bargaining agreement negotiated by their union.[3] The Second Circuit correctly held that Section 2 First and Seventh, 45 U.S.C. § 152, do not provide such a cause of action for individual employees under the RLA. App. 8a.

As stated in the Second Circuit's opinion, the text of Section 2 First[4] and Seventh[5] of the RLA does not

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[3] As discussed in Section III, infra, Petitioners failed to state a claim against their union representative for breach of the duty of fair representation under the Railway Labor Act and are not challenging that holding directly through this petition. App. 24a-29a. Instead, Petitioners seek to create a new alternative means for challenging indirectly the collective bargaining conduct of their union representative through a statutory cause of action against their employer.

[4] Section 2 First states: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or

reveal any congressional intent to create a right of action for individual employees. App. 9a. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001) (internal quotation marks omitted). In this instance, the statute regulates actions by the carrier in its dealings with the union that represents a craft or class of its employees. The purpose of the provision is to regulate the collective bargaining process.

In concluding that there is no implicit right of action in favor of individual employees under Section 2 First and Seventh, the Second Circuit analyzed the RLA and applied the Court's decision in *Cort v. Ash,* 422 U.S. 66, 78 (1975). App. 9a. There was nothing unusual or controversial about this analysis. The Second Circuit simply considered the *Cort* decision's four factors to reach its determination:

> First, is the plaintiff one of the class for whose special benefit the statute was enacted – that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the

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otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First.

[5] Section 2 Seventh states: "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." 45 U.S.C. § 152 Seventh.

> plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[6]

App. 9a (quoting *Cort v. Ash,* 422 U.S. at 78).

In determining whether the Petitioners were one of the class for whose special benefit the statute was enacted, the first factor in the *Cort* analysis, the Second Circuit acknowledged that "The statutory requirement in § 152, First that carriers strive to 'maintain agreements concerning rates, rules, and working conditions' may well benefit individual employees." App. 10a. The Second Circuit correctly held that "[t]his is not sufficient, however, to imply a private right of action because the statutory scheme achieves its purpose by collectivizing employees' individual interests." *See* App. 10a (quoting *NLRB v. Allis-Chalmers Mfg.*, 388 U.S. at 180 ("majority-rule concept is today unquestionably at the center of our federal labor policy")).

Evaluating the second *Cort* factor, the Second Circuit then looked to the RLA to determine whether there was any indication of legislative intent, explicit or implicit, either to create or deny an individual employee's right to pursue litigation under Section 2 First. The Second Circuit determined that "Congress clearly intended that individual preferences give way to the collective position embodied by the certified

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[6] *Cort's* fourth criteria for determining whether a statute creates an individual cause of action in not relevant to the Federal question raised by the Petition because the Railway Labor Act's collective bargaining procedures are not a traditional concern of the states.

union representative." App. 11a. Analyzing Section 2 Second[7] and 2 Fourth,[8] the Second Circuit correctly determined that "[t]aken together, these provisions leave no doubt that, where, as here, a 'craft or class of employees' has selected a representative union, Congress intended the power to 'make' and the duty to maintain agreements concerning rates of pay, rules, and working conditions,' *id.* § 152, First, to run between the representative union and the company." App. 11a-12a. This conclusion is well supported by the jurisprudence of federal labor law. *See Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 200 (1944); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.").

As to the third factor, the Second Circuit looked to the text of Sections 2 First and Seventh of the RLA in determining that it would not be consistent "with the underlying purposes of the legislative scheme" to imply a cause of action for employees under Section 2 First. As the Court has held, the purpose of Section 2 Seventh is twofold: "it operates to give legal and

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[7] Section 2 Second states: "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." 45 U.S.C. § 152 Second.

[8] Section 2 Fourth states, in pertinent part: "Employees shall have the right to organize and bargain collectively *through* representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152 Fourth (emphasis added).

binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 156 (1969). When a union has been certified as the representative of a craft or class of employees, negotiating and administering agreements is the *exclusive duty* of the union.[9] This basic tenet of federal labor law was articulated by the Court in *Allis-Chalmers*:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.

388 U.S. at 180. Indeed, the principle of exclusive representation by majority rule is firmly entrenched in the RLA. *See* 45 U.S.C. § 152 Fourth ("The *majority of any craft or class of employees* shall have the right to determine who shall be the representa-

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[9] Even assuming *arguendo* individual employees could intervene in the collective bargaining process to assert a status quo claim under Section 2 Seventh, there would be no basis for such a claim in case because American did not act unilaterally in altering the CBA. Rather, American negotiated the RPA with the Petitioners' exclusive bargaining representative, the APFA. The RLA "explicitly allows the parties to alter the status quo by agreement." *Air Line Pilots Ass'n v. Pan Am World Airways*, 765 F.2d 377, 381 (2d Cir. 1985).

tive of the craft or class for the purposes of this Act." (emphasis added)); *Steele*, 323 U.S. at 200 ("The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining"); *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 548 (1937) (Section 2 Ninth of the RLA creates "the affirmative duty to treat *only* with the true representative, and hence the negative duty to treat with *no other*" (emphasis added)).

In dismissing Petitioners' claims, the Second Circuit correctly held that allowing dissatisfied individual employees to "sue American Airlines under § 152, First to set aside the RPA agreed to by their union representative and ratified by the union membership would risk the very disruption in commerce that the RLA seeks to avoid." App. 14a.

The Second Circuit also noted that Section 2 Seventh may benefit employees, but the second and third *Cort* factors "weigh heavily against recognition of a private right of action by individual employees." App. 15a. Quoting the text of the statute, the Second Circuit determined that Section 2 Seventh "is implicated only where a 'craft or class' of employees has already selected a representative to bargain collectively on its behalf . . . and where an employer attempts to make changes that affect the employees as a class.'" App. 15a; *see also* 45 U.S.C. § 152 Fourth & Seventh. The Second Circuit correctly held that an individual employee's right to bargain with the employer is subsumed by the authority of the certified bargaining representative. This conclusion is again well-supported by the Court's precedent. *See*

Allis-Chalmers, 388 U.S. at 180; *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 347 (1944) ("[E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions.").

The scope of the danger posed to collective bargaining under the RLA by Petitioners' claims is self-evident. The RLA's goal of avoiding interruptions to commerce would be compromised by permitting individual employees to bring statutory claims against a carrier in order to invalidate a collective bargaining agreement negotiated by their union representative. As the Second Circuit correctly noted, Petitioners' dispute is "not with American Airlines . . . but rather with the union, which negotiated for the modified CBA terms that now bind American Airlines and that form the basis of plaintiffs' claim." App. 14a. Petitioners' disagreement is with their union and should only be brought as a claim for breach of the duty of fair representation. *See Allis-Chalmers*, 388 U.S. at 181 ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that the Court found it necessary to fashion the duty of fair representation."). But after exhaustive discovery permitted by the district court, the Petitioners failed to prove that the APFA breached its duty of fair representation. Indeed, the Petitioners have now chosen to abandon their duty of fair representation claims in their Petition.

Petitioners are trying to use statutory claims—and an attempt to be certified as the representative of the class of affected flight attendants—to usurp the role of their Section 2 Ninth representative the APFA,

in negotiating a collective bargaining agreement. App. 2a. If Petitioners were to succeed, the federal labor law principle of majority representation would be upended and the clear purpose of the RLA of facilitating industrial stability through collective bargaining would be subverted. If Petitioners' theory were adopted, it would apply to *every* agreement negotiated by a carrier and a union because every new agreement, by definition, changes the "status quo." And in every negotiation, there are some employees, like the Petitioners, who are unhappy with the agreement reached. Therefore, according to Petitioners' unsupported theory, *every* labor agreement in the airline and railroad industries (the industries that are regulated by the RLA) would be subject to challenge under Sections 2 Seventh and 2 First—and claims for money damages—by individual employees who are unhappy with the agreement. That is not the law, nor should it be the law under the RLA.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON WHETHER SECTION 2 FIRST OR SEVENTH ALLOWS A RIGHT OF ACTION FOR INDIVIDUAL EMPLOYEES

A. The Cases Cited By Petitioners Do Not Support An Individual Employee's Direct Right Of Action

The Second Circuit correctly concluded that there is no judicial support for the proposition that Section 2 First or Section 2 Seventh provides an individual employee cause of action against his or her employer. Petitioners cite a number of cases for the contrary conclusion. None of the cases Petitioners cite apply to Section 2 First or Seventh.

Petitioners cite *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 671 (7th Cir. 1996); *Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 926-27 (1st Cir. 1983); and *Burke v. Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031, 1032-1034 (9th Cir. 1970), as support for their assertion that "at least three Circuits have expressly rejected the analysis upon which the Second Circuit" relied in holding that "the only party with standing to sue for violations of the status quo is the union." Petitioner's Brief at 11-12. The cases cited by the Petitioners do not involve collective bargaining claims under Sections 2 First and Seventh, however. Rather, they involve challenges to employee discharges under different sections of the RLA, which focus on the right of individual employees to engage in union organizing activity (*i.e.*, activity that predates the establishment of a collective bargaining representative). *See Lebow,* 86 F.3d at 671 (considering whether a non-union employee could sue for punitive damages under Section 2 Tenth of the RLA in a claim for wrongful discharge); *Stepanischen*, 752 F.2d at 926-27 (applying the *Cort v. Ash* test and holding that Section 2 Fourth of the RLA implies a right of action for an employee who was discharged allegedly because of union organizing activity); and *Burke*, 433 F.2d at 1032-1034 (considering whether an unrepresented employee may bring an action against his employer under Section 2 Fourth of the RLA for reinstatement and damages).

In addition to relying on case law arising under other, inapposite provisions of the RLA, the Petitioners overread the Second Circuit's holding in this case. The Second Circuit did not hold that an individual employee cause of action is *never* available under *any* provision of the RLA. The court only focused on the

collective bargaining and status quo provisions of Section 2 First and 2 Seventh of the RLA.[10] The Second Circuit found that "it would not be consistent 'with the underlying purposes of the legislative scheme' to imply a private cause of action for employees under § 152, First." App. 12a. The Second Circuit further held that Section 2 Seventh does not provide "an implied private right of action by individual employees against an employer." App. 15a. The Second Circuit correctly noted, however, that Section 2 First "is distinguishable from § 152, Third and Fourth, for which individual rights of action have been recognized, in that the latter provisions are specifically aimed at preventing employer interference with individual employees' ability to join a collective bargaining scheme." App. 11a. In addition, the Second Circuit distinguished Section 2 Seventh from Sections 2 Third and Fourth when it noted that Section 2 Seventh "preserves the status quo while the employer and *the union* engage in the negotiation required by 45 U.S.C. §§ 155 and 156." App. 15a (emphasis in original).

Petitioners also cite a number of cases in which they assert that both the Court and other circuits have recognized the existence of an individual employee right of action for violations of the status quo. Petitioners' Brief at 12-13. In each of the cases they cite, however, the cause of action was brought *by the union or by the carrier*, not by individual

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[10] Indeed, the Second Circuit recognized that other circuits have found an individual cause of action under Sections 2 Third and Fourth of the RLA. App. 6a; *see generally Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426 (1989).

employees. [11] The Second Circuit specifically recognized in its decision that "although the RLA does not explicitly provide a private civil cause of action, [the Court] has found such an action by *a union* implicit in the statutory scheme." App. 6a (emphasis in original); *see also Texas & New Orleans R.R. v. Bhd. of Ry. & Steamship Clerks*, 281 U.S. 548, 555 (1930). The notion that *a union* may bring a private cause of action for violation of the status quo is consistent with the union's duties as the exclusive bargaining representative. But the union's right to bring that cause of action, on behalf of all of the employees it represents, necessarily displaces the right of an individual employee to bring such a cause of action

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[11] *See* Petitioners' Brief at 12-14: *Consol. Rail Corp. v. RLE*, 491 U.S. 299 (1989) (suit by union); *Chicago & Nw. Ry. v. UTU*, 402 U.S. 570 (1971) (employer suit against union to enjoin strike); *Detroit & Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142 (1969) (same); *Order of R.R. Telegraphers v. Chicago. & Nw. Ry.*, 362 U.S. 330 (1960) (employer suit against union to enjoin strike); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946) (suit by union); *Order of Rwy. Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944) (suit by union); *Virginian Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937) (suit by union under Section 2 Ninth); *IAM v. Transportes Aereos Mercantiles*, 924 F.2d 1005 (11th Cir. 1991) (suit by union); *UTU, Local 63E v. Penn Cent. Co.*, 443 F.2d 131 (6th Cir. 1971) (same); *Southern Ry. v. B.L.F.E.*, 384 F.2d 323 (D.C. Cir. 1967) (same); *United Indus. Workers v. Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965) (same); *R.R. Yardmasters. v. Pennsylvania R.R..*, 224 F.2d 226, 227 (3d Cir. 1955) (same); *see Reg'l Airline Pilots v. Wings West Airlines*, 915 F.2d 1399 (9th Cir. 1990) (same); *Carbone v. Meserve*, 645 F.2d 96, 98, 100 (1st Cir. 1981) (suit by union). *Mungin v. Florida E. Coast Ry. Co.*, 416 F.2d 1169 (5th Cir. 1969), involved a group of employees' challenge to employer's refusal to reinstate them pursuant to a status quo injunction obtained by the government, after the union breached the duty of fair representation. *Id.* at 1172-74, 1178.

when the union has determined that the employees' collective interests would not be advanced by doing so. *See Allis-Chalmers*, 388 U.S. at 180.

The remainder of the cases on which Petitioners rely are equally unavailing. Petitioners cite a number of cases in which individual employees challenged the conduct of unions that were *not* their certified bargaining representative.[12] That is contrary to the situation here, where individual employees are challenging the decisions of their certified bargaining representative.

Petitioners have not and cannot cite any case that supports their theory that a right of action is available to them under Section 2 First and 2 Seventh to challenge a collective bargaining agreement negotiated by their elected union representative.

B. The Second Circuit's Conclusion That Section 2 First And 2 Seventh Do Not Provide A Direct Right Of Action For Individual Employees Is Consistent With The Court's Precedent And Decisions In The Third And Seventh Circuits

The Second Circuit's decision also is consistent with relevant precedent in the Third and Seventh Circuits. In *Bensel v. Allied Pilots Ass'n*, the Third Circuit held that individual employees do not have a

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[12] *See* Petitioner's Brief at 13-14: *Bhd. of R.R. Trainmen v. Smith*, 251 F.2d 282 (6th Cir. 1958) (union sought discharge of unrepresented employees through enforcement of its union shop agreement); *Dwellingham v. Thompson*, 91 F. Supp. 787 (E.D. Mo. 1950) (dispute resolution between carrier and union that was not the employees' bargaining representative resulted in displacement of the employees), *aff'd sub nom., Rolfes v. Dwellingham*, 198 F.2d 594 (8th Cir. 1952).

right of action under Section 2 Second or 2 Ninth of the RLA. *Bensel v. Allied Pilots Ass'n*, 387 F.3d 298 (3d Cir. 2004).[13] The *Bensel* decision is squarely applicable to Petitioners' claims. Section 2 First and 2 Seventh of the RLA, like Section 2 Second and 2 Ninth (the provisions at issue in *Bensel*), relate to the carrier's relationship with the employees' certified representative and the process of making and maintaining agreements with that representative. As the Third Circuit held in *Bensel*, a court must focus on the purpose of the statutory provision at issue in determining whether a right of action exists for individual employees. *Bensel*, 387 F.3d at 318-19. Because Section 2 First and 2 Seventh are designed to foster agreements between a carrier and the certified union representative, and thereby avoid interruptions to commerce, the Second Circuit correctly held that the purpose of those provisions would be undermined if individual employees were permitted to sue to invalidate those agreements. App 12a & 14a.

In *Renneisen v. American Airlines, Inc.*, 990 F.2d 918 (7th Cir. 1993), the Seventh Circuit held that a group of individual pilots could not bring a claim challenging a collective bargaining agreement negotiated by American and the pilots' union under Section 2 of the RLA. The Seventh Circuit's reasoning is directly applicable here:

> RLA Section 2 was not designed to give minority groups within a union a cause of action against their employer when they cannot persuade their

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[13] In *Bensel*, the Plaintiff also asserted a Section 2 First claim alleging that American and TWA failed to negotiate in good faith. *Bensel*, 387 F.3d at 317-318.

> own union to take actions they deem to be in the union's best interest. Since plaintiffs' own union has not challenged the Agreement, we cannot find that the Agreement violates the union's right under the RLA to bargain collectively for its members.

Id. at 924.

III. PETITIONERS' REMEDY FOR THEIR ALLEGED INJURIES WAS THROUGH A CLAIM FOR BREACH OF THE DUTY OF FAIR REPRESENTATION

The Railway Labor Act's insulation of the collective bargaining process from individual employee causes of action does not leave dissatisfied, non-majority union members without a remedy in appropriate circumstances. Well-established precedent permits employees to challenge decisions made and actions taken by their union representative through a claim for breach of the duty of fair representation ("DFR"). And that is just what the Petitioners did in this litigation—they challenged, unsuccessfully, the APFA's decision to enter into the RPA in order to avoid an imminent bankruptcy filing by American. The fact that this challenge was unsuccessful and is no longer being pursued in this Petition does not enliven the alternative claims that they are electing to pursue. As the Second Circuit stated, "[Petitioners'] dispute is [] not with American Airlines, which could not take the action plaintiffs seek without violating the modified CBA, but rather with the union, which negotiated for the modified CBA terms that now bind American Airlines and that form the basis of plaintiffs' claim. A claim of this nature is appropriately brought against the union for breach of the duty of fair representation." App. 14a (quoting *Allis-*

Chalmers., 388 U.S. at 181 ("It was because the national labor policy vested unions with power to order the relations of employees with their employer that the Court found it necessary to fashion the duty of fair representation.")).

The case law regarding the duty of fair representation is well developed. As the Court has stated, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty." *Steele*, 323 U.S. at 202. Plaintiffs' claims involve both the collective bargaining process and the APFA's conduct as the exclusive bargaining representative, conduct which is at the center of the RLA and governed by the duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 174, 177 (1967); *Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 76 (1991). As such, Plaintiffs can only challenge the RPA by proving that APFA breached its duty of fair representation and that American was a party to that breach.

In this case, the Petitioners failed to persuade either the district court or the court of appeals that the APFA's actions in negotiating the RPA were "arbitrary, discriminatory, or in bad faith." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-39 (1953); *Spellacy v. Air Line Pilots Ass'n*, 156 F.3d 120, 126 (2d Cir. 1998), *cert. denied* 526 U.S. 1017 (1999). Now, having abandoned their duty of fair representation claims in this Petition, the Petitioners should not be allowed to engage in an end-run around that outcome and their bargaining representative's exclusive prerogative and

responsibility to act on behalf of the craft or class under the RLA and federal labor policy.

IV. PETITIONERS' STATE LAW CLAIMS ARE PREEMPTED BY THE RLA

The Second Circuit correctly held the Petitioners' state law claims are preempted by the RLA. App. 16a-17a. The Petitioners' remaining state common law claim pursued through this Petition—against APFA and American for alleged breach of and interference with the union constitution—is just another collateral challenge to the collective bargaining processes mandated by the Railway Labor Act.

In bringing this claim, Petitioners seek to use state law to invalidate a collective bargaining agreement negotiated by American and the union representing its flight attendants. Because this state common law claim interferes with the resolution of collective bargaining disputes under the Railway Labor Act and the formation of collective agreements, claims such as this are pre-empted by the RLA. As the Second Circuit found, collective bargaining is "core RLA conduct" and "the imposition of additional state liability on the defendants for conduct during collective bargaining negotiations would upset the 'balance of power' established by the RLA" and "frustrate effective implementation of the [Act's] processes." App. 22a-23a (quoting *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986); *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

American adopts the arguments of the APFA in opposition to the Petition on this issue. The collective bargaining procedures of the Railway Labor Act are regulated exclusively by federal labor law and there-

fore "protected against infringement by the states." *Jacksonville Terminal*, 394 U.S. at 381-86 & 384 n.19 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

CONCLUSION

For the foregoing reasons, American respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

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